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No. 04-1034*

In the

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

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* This case is consolidated with *Carabell v. United States Army Corps of Engineers*, No. 04-1384.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to nonnavigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

CORPORATE DISCLOSURE STATEMENT

Prodo, Inc.; Rolling Meadows Hunt Club; and Pine River Bluff Estates, Inc., are wholly owned by John A. Rapanos and Judith A. Nelkie Rapanos. Petitioner companies have no parent company and no publicly held company owns 10% or more of Petitioners' stock.

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National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 20

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United States v. Lanier, 520 U.S. 259 (1997) 26

United States v. Lopez, 514 U.S. 549 (1995) 23-24

TABLE OF AUTHORITIES—Continued

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United States v. Mills,
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United States v. Morrison, 529 U.S. 598 (2000) 24

United States v. Plaza Health Laboratories, Inc.,
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Addison, Thomas & Burns, Timothy, *The Army Corps of Engineers and Nationwide Permit 26: Wetland Protection or Swamp Reclamation*, 18 Ecology L.Q. 619 (1991) 17

Adler, Jonathan H., *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1 (1999) 29-30

Broderick, Gregory T., *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 Colum. J. Envtl. L. 473 (2005) 6-7, 17-18

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Brown, Gordon M., *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527 (1994) 25

http://www.epa.gov/owow/wetlands/vital/status.html (last visited Nov. 8, 2005) 29-30

http://www.mass.gov/dep/water/laws/ilsf.htm (last visited Nov. 11, 2005) 30

http://www.michigan.gov/deq/0,1607,7-135-3313_3682---,00.html (last visited Nov. 17, 2005) 21

http://www.michigan.gov/deq/0,1607,7-135-3313_3684---,00.html (last visited Nov. 17, 2005) 21

http://www.michigan.gov/deq/ 0,1607,7-135-3313_3687-10419--,00.html (last visited Nov. 17, 2005) .. 21

http://www.michigan.gov/deq/ 0,1607,7-135-3313_3687-10801--,00.html (last visited Nov. 17, 2005) .. 21

U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* (Feb. 2004), *available at* www.gao.gov/new.items/d04297.pdf (last visited May 2, 2005) 27

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The opinion of the court of appeals is reported at 376 F.3d 629 (6th Cir. 2004), Petition Appendix (PA) A. The opinion of the district court, filed on March 22, 2000, was not published but is included in PA B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 26, 2004, *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004). That court's denial of the Petition for Rehearing En Banc was entered on November 2, 2004. On October 11, 2005, this Court granted certiorari and consolidated this case with *Carabell v. United States Army Corps of Engineers*, No. 04-1384. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS AT ISSUE

The United States Constitution provides that Congress has power "[t]o regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearing, for the discharge of

dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which

could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 CFR § 328.3(a) (2005).

The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 CFR § 328.3(b).

The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated

> from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 CFR § 328.3(c).

INTRODUCTION

To establish federal jurisdiction under § 404(a) of the Clean Water Act, this Court has required a "significant nexus" between the regulated wetlands and a traditional navigable water. That nexus cannot be satisfied by the mere presence of any sort of hydrological connection.

By its terms, § 404(a) requires a federal permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Act defines "navigable waters" only as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court found "§ 404(a) to be clear," *id.* at 172, and concluded the "Corps' *original* interpretation of the CWA" was correct. *Id.* at 168. In 1974, two years afer the statute's enactment, the Corps interpreted the term "navigable waters" to mean those waters subject to the ebb and flow of the tide and "susceptible for use for purposes of interstate or foreign commerce." *Id.* Accordingly, this Court held Congress did not intend "to exert anything more than its commerce power over navigation," *id.* at n.3, and that the text of the Act would not allow the exercise of federal jurisdiction over "ponds that are *not* adjacent" to traditional navigable waters. *Id.* at 168.

To give effect to the intent of Congress and the plain text of the statute, therefore, this Court concluded jurisdictional wetlands must have a "significant nexus" with traditional navigable waters. That nexus was found in a case where the

wetland was inseparably bound up with and "actually abuts on a navigable waterway." *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985). But that nexus is not found here.

STATEMENT OF THE CASE

John and Judith Rapanos own three parcels of land in the State of Michigan known as the Salzburg, Hines Road, and Pine River sites. PA at A2. In the 1980's and 90's, the Rapanos hired contractors to prepare these sites for development. *See* PA at A2-A4. The government contends the site preparations resulted in the unauthorized filling of jurisdictional wetlands with sand and other materials in violation of § 404(a) of the Clean Water Act. *See* PA at B1. Therefore, the Environmental Protection Agency (EPA) ordered the Rapanos to stop all land-clearing activities and to restore the sites to their original condition. *Id.* at B30-B36. But the Rapanos refused based on their belief that the Act does not apply to nonnavigable, intrastate wetlands far removed from any traditional navigable waters. *Id.* at B2.

In the case of the Salzburg site, the nearest traditional navigable water is approximately 20 miles away. *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002). Any surface water runoff is intermittent and connected to a navigable waterway only by means of a manmade ditch (or drain), a nonnavigable creek and a river that becomes navigable some point downstream and ultimately flows into the Saginaw Bay. *Id.* at 1014-15. *See also* PA at A22. According to the court below, the wetlands at the Hines Road site have a surface water connection—"at least seasonally"—to a ditch that runs along the site and has a surface water connection to the Tittabawassee River, a traditional navigable water. PA at A23. Similarly, the government claims wetlands at the Pine River site are "in close proximity to the Pine River" and have a surface water connection to that river which flows into Lake Huron, a

traditional navigable water. PA at A23-A24. None of these wetlands are physically adjacent to (i.e., abut) a traditional navigable waterway. *Id.* at A21-A29. Nor was an actual discharge into traditional navigable waters proven or even alleged. Nevertheless, the government claims jurisdiction over the sites because they contain wetlands "adjacent" to "tributaries" with a connection to traditional navigable waters. *Id.*

In 1994, the EPA brought criminal charges against John Rapanos for filling wetlands on the Salzburg site without a § 404(a) permit. *Id.* at A2-A4. Mr. Rapanos was convicted in 1995 and although the trial judge refused to sentence Mr. Rapanos to jail for "mov[ing] some sand from one end [of his property] to the other,"[1] he was fined $185,000, and

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[1] "The trial judge, Chief Judge Lawrence P. Zatkoff of the Eastern District of Michigan, refused to sentence Mr. Rapanos to jail despite the federal sentencing guidelines, giving the following reasons:

> the case that I just sentenced prior to this case . . . was the case of Mr. Gonzalez, who was a person selling dope on the streets of the United States. He is an illegal person here. He's a citizen of Cuba, not an American citizen. He has a prior criminal record . . . . So here we have a person who comes to the United States and commits crimes of selling dope and the government asks me to put him in prison for ten months. And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and government wants me to give him sixty-three months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it. *Rapanos*, 235 F.3d at 259-60."

See Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal*

(continued...)

sentenced to three years probation. *Id.* at A4. The Sixth Circuit upheld the conviction but this Court vacated that decision and remanded the case in light of *SWANCC* in 2001. *Id.* On remand, the district court set aside the conviction ruling that, under *SWANCC*, the federal government lacked jurisdiction to regulate wetlands that are not physically adjacent to traditional navigable waters. *Id.* at A4-A5. *See also United States v. Rapanos*, 190 F. Supp. 2d 1011. But, on appeal, the Sixth Circuit reversed the district court finding *SWANCC* was limited to its facts and had little effect on CWA jurisdiction. PA at A5. This Court denied Mr. Rapanos' subsequent petition for writ of certiorari in 2004. *Id.* Simultaneous to the criminal case in 1994, this civil action was filed against the Rapanos. *Id.*

A. The District Court Decision

After a bench trial, the district court found the Rapanos had filled approximately 54 acres of wetlands on their three properties. *See* PA at A5. In reliance on the government's "Migratory Bird Rule," the district court rejected the Rapanos' defense that § 404(a) jurisdiction does not extend to wetlands miles away from any traditional navigable waters. The "Migratory Bird Rule" was an administrative interpretation of "navigable waters" and authorized federal regulation of any water that could be used by migratory birds. *Id.* at A11. However, when this Court invalidated the Migratory Bird Rule in *SWANCC* because it exceeded statutory authority, the district court "amended its findings to remove all references to the 'Migratory Bird Rule' as a basis for federal jurisdiction." *Id.* at A6 n.2. Instead, the court held the distant wetlands on the Rapanos' property were "adjacent" to "tributaries" and, therefore, jurisdictional because they are "hydrologically connected" to traditional navigable waters. *Id.* at A8.

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[1] (...continued)
Jurisdiction Under the Clean Water Act, 30 Colum. J. Envtl. L. 473, 508 n.238 (2005).

B. The Sixth Circuit Opinion

On appeal the Rapanos took the position that *SWANCC* did more than invalidate the "Migratory Bird Rule." They argued that decision also prohibited federal regulation of nonnavigable wetlands that are not physically adjacent to (i.e., abut) a traditional navigable water. *See* PA at A20-A21. Although the Sixth Circuit acknowledged the wetlands on the Rapanos' parcels are not physically adjacent to a traditional navigable water, the court found this fact irrelevant to its jurisdictional determination:

> What is required for CWA jurisdiction over "adjacent waters," however, is a "significant nexus between the wetlands and 'navigable waters,'" which can be satisfied by the presence of a hydrological connection.

PA at A16 (citation omitted).

For this conclusion, the Sixth Circuit relied primarily on its prior *Rapanos* ruling that was based on the Fourth Circuit decision in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). Quoting extensively from *Deaton*, the court stated that "adjacent waterways" include any part of a tributary system that flows into a traditional navigable water, PA at A16, and that the Corps could regulate the "whole tributary system of any navigable waterway," *id.* at A17. According to the Sixth Circuit, *SWANCC* "limits the application of the Clean Water Act," but it does not restrict "the Act's coverage to only wetlands directly abutting navigable water." *Id.* at A15.

The Sixth Circuit's narrow reading of *SWANCC* did not stop there, however. The court also refused to follow this Court's lead in denying *Chevron* deference to the government's reinterpretation of the CWA. *See* PA at A17-A20. In *SWANCC*, as the Sixth Circuit noted, this Court was unwilling to accord *Chevron* deference to the government's "Migratory

Bird Rule" because the regulation impinged on the state's "traditional and primary power over land and water use" and, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id.* at A19-A20 (citing *SWANCC*, 531 U.S. at 173-74). Nevertheless, the Sixth Circuit determined *Chevron* deference was appropriate in this case because this Court deferred to the Corps' interpretation of the CWA in *Riverside Bayview*. *Id.* at A19-A20.

SUMMARY OF THE ARGUMENT

The "significant nexus" required by this Court to establish federal jurisdiction over wetlands under § 404(a) of the Clean Water Act cannot be satisfied by the mere presence of any sort of hydrological connection. In *Riverside Bayview* this Court held § 404(a) extended to "a wetland that actually abuts on a navigable waterway." 474 U.S. at 135. And, in *SWANCC*, this Court declared the text of the Act does not authorize federal regulation of "ponds that are *not* adjacent to" traditional navigable waters and that Congress' concern for the aquatic ecosystem "showed its intent" to regulate those wetlands "inseparably bound up" with actual navigable waters. 531 U.S. at 167-68. This Court has never held that § 404(a) applies to water bodies with a mere hydrological connection to traditional navigable waters and neither the Act nor the federal regulations adopt a "hydrological connection" test.

Thus far, this Court has found the "significant nexus" standard is met where the wetlands abut and are inseparably bound up with a traditional navigable water. This Court need go no further. It is undisputed that the wetlands in this case do not abut a traditional navigable water. Instead, they lie up to twenty miles away and are connected to traditional navigable waters only by means of intermittent surface flow through a long series of natural and manmade conduits. Therefore, these

wetlands are not "bound up" with traditional navigable waters like the wetlands in *Riverside Bayview* where it was difficult to tell where "water ends and land begins."

In addition to the plain language, the need for a strict nexus requirement is suggested by the history of the Act. This Court has already determined that Congress did not intend the term "navigable waters" to be given "the broadest possible constitutional interpretation." Rather, the history of the Act shows Congress was only exerting "its commerce power over navigation." Therefore, CWA regulations covering any wetland with a hydrological connection to traditional navigable waters, and purporting to represent the full reach of the Commerce Clause, cannot be sustained.

Likewise, the express policies and goals of the CWA indicate Congress intended to address water pollution by a division of labor between the States and the central government whereby the States regulate pollution upstream at its source and the federal agencies regulate pollution downstream in the navigable waters. According to this Court, Congress did not intend to intrude into areas of traditional state concern but exercised its legislative prerogative and *chose* to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution" and to control local land and water use.

Finally, a strict nexus requirement is necessary to avoid the substantial constitutional and federalism issues raised by the government's extreme reading of the CWA. Just as in *SWANCC*, the government puts forward a novel Commerce Clause theory to support its assertion of authority over the discharge of any fill activity (no matter how insignificant) in a wetland with any sort of hydrological connection (no matter how attenuated) to a traditional navigable water. This raises a significant constitutional question that can only be avoided, as this Court did in *SWANCC*, by reading "the statute as written."

A plain reading of the Act is also warranted to avoid the significant due process issues raised by the strict civil and criminal penalties attached to a Clean Water Act violation and the government's inconsistent and uncertain jurisdictional standards. Additionally, federal regulation of "the whole tributary system of any navigable waterway" impinges on the States' traditional power over land and water use just as the "Migratory Bird Rule" in *SWANCC*. Had Congress intended to shift the federal-state framework in this way, it would have provided a clear statement it intended to do so. But it did not do so. Therefore, to effectuate the intent of Congress, this Court should interpret the Clean Water Act to avoid these constitutional and federalism problems, as it did in *SWANCC*, and affirm a strict nexus requirement.

ARGUMENT

I

SWANCC AND *RIVERSIDE BAYVIEW* REQUIRE A "SIGNIFICANT NEXUS" BETWEEN THE WETLAND AND A TRADITIONAL NAVIGABLE WATERWAY

This Court has established that jurisdictional wetlands under § 404(a) of the Clean Water Act must have a "significant nexus" with traditional navigable waters. Thus far, this Court has only recognized that wetlands that abut and are inseparably bound up with traditional navigable waters meet that jurisdictional standard.

A. *Riverside Bayview*

Riverside Bayview Homes, Inc., owned 80 acres of low lying marshland (a wetland) abutting a traditional navigable waterway near the shores of Lake St. Clair in Macomb County, Michigan. *Riverside Bayview*, 474 U.S. at 124. When the company placed fill material on the property without a federal permit, the Corps asserted jurisdiction over the property as an

"adjacent wetland" and obtained an injunction from the district court. *Id.* at 124-25. Under Corps regulations, wetlands are subject to § 404(a) of the Clean Water Act if they are "adjacent" to jurisdictional waters. 33 CFR § 328.3(a)(7). The regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." *Id.* § 328.3(c). The question raised in the case was whether the regulations were a valid exercise of the Corps' statutory authority. The lower courts upheld the regulations as applied to the contiguous marshland and found the wetland was "adjacent" under the Corps regulations because the area was characterized by saturated soil conditions and wetland vegetation that extended to the abutting "Black Creek, a navigable waterway." *Riverside Bayview*, 474 U.S. at 131.

Because "the Corps must necessarily choose some point at which water ends and land begins," that physical side-by-side connection between the wetland and the traditional navigable water formed the basis for this Court's decision in *Riverside Bayview*. *Id.* at 132. This Court expressly held that Riverside Bayview Homes must obtain a § 404(a) permit "[b]ecause respondent's property is part of a wetland that *actually* abuts on a navigable waterway." *Id.* at 135 (emphasis added).

B. *SWANCC*

The Solid Waste Agency of Northern Cook County sought to fill certain small ponds located wholly within two counties in the State of Illinois for use as a municipal waste disposal site. *SWANCC*, 531 U.S. at 162-63. These ponds were formed as a result of historic sand and gravel mining in the area and were nonnavigable and hydrologically isolated from other waters. *Id.* at 163-66. The ponds also did not abut a traditional navigable waterway like the wetlands in *Riverside Bayview*. *Id.* Nevertheless, the Corps asserted jurisdiction over the ponds and denied SWANCC a § 404(a) permit relying on its "Migratory Bird Rule" that authorized federal regulation under the CWA of

any waters that could be used by migratory birds, which were found on the site. *Id.*

In response to this claim of authority, this Court observed that although Congress intended to protect the Nation's waters from pollution in the Clean Water Act, Congress also chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" in local waters. *Id.* at 166-67 (citing the Act at 33 U.S.C. § 1251(b)). This Court then turned to its earlier decision in *Riverside Bayview* to see if that decision provided a precedent for determining whether Congress intended CWA jurisdiction to extend to nonnavigable, isolated, intrastate ponds. This Court stated: "In *United States v. Riverside Bayview Homes, Inc.*, we held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway." *Id.* at 167 (citations omitted). And, "We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* But, "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.*

After discussing what this Court *had* determined in *Riverside Bayview*, that the Corps could regulate wetlands that abut and are inseparably bound up with a traditional navigable waterway, this Court pointed out in *SWANCC* what it *had not* determined in *Riverside Bayview*: "Indeed, we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water.'" *Id.* The answer to that question, this Court found, was clear from the plain language of the Act:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to

> ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 168.

This Court used the term "open waters" and "navigable waters" interchangeably[2] and relied on the Corps' own contemporaneous interpretation of the Act in 1974 when it stated that § 404(a)'s use of the term "navigable waters" had its traditional meaning as waters subject to the ebb and flow of the tide and capable of use "by the public for purposes of transportation or [interstate] commerce." *Id.* at 168.

Accordingly, this Court refused to accept the Corps' invitation to extend federal jurisdiction over the remote nonnavigable ponds in *SWANCC* stating: "In *Riverside Bayview Homes*, we recognized that Congress intended the phrase "navigable waters" to include 'at least some waters that would not be deemed "navigable" under the classical understanding of that term.'" *Id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133). But, "[w]e cannot agree, that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute," as the agencies and lower courts had done. *Id.* at 172. Although this Court said in *Riverside Bayview* that the word "navigable" had "limited effect,' this Court clarified in *SWANCC* that

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[2] In describing its holding in *Riverside Bayview*, this Court stated: "[W]e held that the Corps had § 404(a) jurisdiction over wetlands that actually abutted on a navigable waterway." *SWANCC*, 531 U.S. at 167. Later, employing synonymous terms, the Court said, in *Riverside Bayview* we "went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters." *Id.* at 172. The term "open waters" stood in as proxy for "navigable waterway."

> it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Having thus concluded that the term "navigable waters," as used in § 404(a), means traditional navigable waters, and that federal jurisdiction does not extend to ponds that are not adjacent to traditional navigable waters, this Court refused to give *Chevron* deference to the Corps' broad interpretation of the Act. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This Court found the statute clear and unambiguous, *SWANCC*, 531 U.S. at 172, and remarked that "respondents face a difficult task in overcoming the plain text and import of § 404(a)," *id.* at 170. This Court also found that the Corps' overly broad interpretation of § 404(a) jurisdiction pushed the very limits of Congress'constitutional authority and that had Congress intended to go this far it would and should have provided a clear statement in the Act that it intended to do so. *Id.* at 172-73.

A clear statement was also required, this Court found, because the Corps' statutory interpretation raised significant constitutional questions about: (1) the reach of the Commerce Clause if the CWA was broadly interpreted; and (2), the resulting imbalance in the federal structure if the federal government could intrude on the States' traditional power over local land and water use by regulating "ponds and mudflats". *Id.* at 173-74. This Court held these constitutional questions negated any need to defer to the Corps' interpretation and invalidated the "Migratory Bird Rule," stating: "[T]his is a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 172-74. "We thus read the statute as written to avoid the

significant constitutional and federalism questions raised by respondents' interpretation, and therefore reject the request for administrative deference." *Id.* at 174.

Taken together, *SWANCC* and *Riverside Bayview* set forth a standard for determining jurisdictional wetlands under § 404(a) of the Clean Water Act. These cases require the jurisdictional determination to be informed by a "significant nexus" which this Court found was satisfied when the wetlands actually abut and are inseparably bound up with a traditional navigable water. That nexus cannot be satisfied by the presence of any sort of hydrological connection. Rather, in addition to the plain text of the Act, the history and policies of the CWA, as well as important constitutional and federalism principles, suggest a need for a strict nexus requirement.

II

THE HISTORY OF THE ACT SUGGESTS A NEED FOR A STRICT NEXUS REQUIREMENT

In 1899, Congress exercised its commerce power over navigation and promulgated the Rivers and Harbors Act (RHA), 33 U.S.C. § 401, *et seq.* Sections 10 and 13 were the main stay of the Act. Section 10 prohibited any obstruction "to the navigable capacity of any of the waters of the United States," unless authorized by law, *id.* § 403, whereas section 13 made it illegal to deposit refuse into or on the bank of "any navigable water of the United States, *id.* § 407. The Act was limited to traditional navigable waters of the United States, subject to the ebb and flow of the tide, and the government's enforcement authority was generally directed at "navigation impeding activities." *See United States v. Holland*, 373 F. Supp. 665, 670 (M.D. Fla. 1974). To provide an easily discernible boundary for federal enforcement, the jurisdictional line was drawn at the mean high water mark. *Id.* This exempted nonnavigable wetlands adjacent to traditional navigable waters. *Id.*

In 1972, Congress passed the Federal Water Pollution Control Act (FWPCA) (now the Clean Water Act) which provided a new regulatory scheme to address water pollution generally. However, Congress employed the terms "navigable waters" and "waters of the United States," commonly used in the Rivers and Harbors Act, as the jurisdictional basis for the Act, without defining the terms. Therefore, in 1974, the Corps defined those terms, as under the RHA, to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 CFR § 209.120(d)(1). When the Corps regulations were challenged as too narrow, the district court in *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975), ruled Congress was exercising more than its commerce power over navigation in the FWPCA and ordered the Corps to revise its regulations to the full extent of the Commerce Clause. *Id.* at 686.

Initially, the Corps balked at the court's order and issued a strikingly prescient statement that the decision would require the agency to issue permits "'for the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountaineer who wants to protect his land from stream erosion.'" *See* Thomas Addison & Timothy Burns, *The Army Corps of Engineers and Nationwide Permit 26: Wetland Protection or Swamp Reclamation*, 18 Ecology L.Q. 619 (1991). But eventually, the Corps embraced the decision with vigor. The resulting regulations, ultimately adopted in 1977 and still in effect today, reflect the broadest possible interpretation, and include all "lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds" and any wetlands adjacent thereto. 33 CFR § 328.3(a)(3)-(7). In effect the regulations appeared to extend federal authority to "virtually every wet surface in the United

States," including all freshwater wetlands. *See* Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 30 Colum. J. Envtl. L. 473, 481 (2005).

In *SWANCC*, the Corps, now accustomed to its sweeping regulatory powers, energetically defended these regulations, as well as its later-enacted "Migratory Bird Rule," arguing that Congress employed the full reach of its commerce power in the Act and this Court should defer to the agency's interpretation of that reach. But this Court read the matter differently: "Indeed, the Corps' *original* interpretation of the CWA, promulgated two years after its enactment, is inconsistent with that which it espouses here." *SWANCC*, 531 U.S. at 168. In 1974, the Corps emphasized that "'[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor'" of jurisdictional waters. *Id.* Therefore, this Court concluded the Corps had not "mistook Congress' intent in 1974." *Id.* However, the Corps sought to bolster its argument with reference to the legislative history. But, to no avail.

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the Conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation" . . . neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation.

SWANCC, 531 U.S. at 168 n.3.

Clearly, the regulation of the entire tributary system of any navigable water, no matter how remote, tenuous, or intermittent, cannot reasonably be said to entail nothing more than Congress' "commerce power over navigation." As a matter of logic and statutory construction, if Congress intended to exert no more than its commerce power over navigation, the Act cannot reach the full extent of the commerce power (or beyond) and embrace all wetlands (or other areas) with any sort of hydrological connection to traditional navigable waters.

That Congress chose not to exert anything more than its commerce power over navigation in the FWPCA is suggested by another noteworthy comparison between that Act and the Rivers and Harbors Act. The penalty for an illegal deposit of refuse into a navigable water under the RHA was a misdemeanor, *see* 33 U.S.C. § 411, while the FWPCA imposes felony criminal sanctions for similar violations. *See* 33 U.S.C. § 1319(c). These penalties include fines up to $100,000 per day of violation and up to 6 years in prison, or both. *Id.* In his criminal case, the government sought a jail sentence for Mr. Rapanos exceeding five years. *See* n.1. And although the trial judge has thrice refused to send Mr. Rapanos to prison for "moving some sand from one end [of his property] to the other," *id.*, the government continues to press for jail time in that case.

Even the civil penalties are onerous—up to $25,000 per day. *See* 33 U.S.C. § 1319(d). Because of a "continuing violation," Mr. and Mrs. Rapanos face potentially millions in fines and fees in this case. *See* PA at B35. In light of the substantial penalties included in the Act, it is doubtful that Congress could have anticipated, let alone intended, such a drastic change in jurisdiction without so much as a mention in any relevant provision of the Act.

This Court has already determined that Congress did not intend to go so far. The history of the Act, as interpreted by this

Court, suggests that to effectuate the intent of Congress a strict nexus requirement must be applied to the government's enforcement authority under the CWA.

III

THE POLICIES AND GOALS OF THE ACT SUPPORT A STRICT NEXUS REQUIREMENT

The overall objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). But the questions presented in this case cannot be resolved by a simple appeal to that laudable goal. *See United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 647 (2d Cir. 1993). In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982), the Circuit Court addressed the scope of the CWA and observed: "it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal." Therefore, even if the purpose section were to be taken at face value, "it is only suggestive, not dispositive of [the issue before us]. Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision." *Id.*

Perhaps with this thought in mind, this Court in *SWANCC* emphasized Congress' other, countervailing concerns in the Act: "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'" *SWANCC*, 531 U.S. at 166-67 (citing 33 U.S.C. § 1251(b)).

Recognition that Congress intended to achieve the objective of protecting the Nation's waters with deference to the federal structure and the "primary responsibilities" of the States underlies this Court's decision in *SWANCC*. Whatever Congress might have done to achieve the goals of the Act, it

chose to rely on the States to regulate pollution at its source while the federal government exercises its customary powers over traditional navigable waters. This was a policy decision fitted to the legislature, not the courts. Congress' reliance on the States is justified.

The State of Michigan, where the subject sites are located, has one of the most aggressive environmental protection programs in the Nation. Under its 1979 Wetland Protection Act, it is one of two states (along with New Jersey) authorized to issue § 404(a) permits in lieu of the Corps. The State's environmental program is much broader than the federal CWA program encompassing both point and nonpoint sources of pollution, http://www.michigan.gov/deq/0,1607,7-135-3313_3682---,00.html (last visited Nov. 17, 2005), as well as surface and groundwater resources, http://www.michigan.gov/deq/0,1607,7-135-3313_3684---,00.html (last visited Nov. 17, 2005). In addition to the State, local governments in Michigan are authorized to regulate wetlands, even if exempted under State regulations, when the wetland is "essential to the preservation of the community's natural resources." *See* http://www.michigan.gov/deq/0,1607,7-135-3313_3687-10801--,00.html (last visited Nov. 17, 2005). The State has also adopted an ambitious plan for wetland restoration. Michigan's Wetland Conservation Strategy (MDEQ 1997) set a short-term goal of restoring 50,000 acres of wetlands by 2010 and a long-tem goal of 500,000 acres. *See* http://www.michigan.gov/deq/0,1607,7-135-3313_3687-10419--,00.html (last visited Nov. 17, 2005). In this case, the State could have exercised regulatory authority over the Rapanos' sites, but appears to have deferred to the EPA for enforcement. *See* PA at A29-A32.

It is axiomatic that the federal government itself cannot regulate water pollution all the way up the hydrological chain, to its very source, *and* "recognize, preserve, and protect" the

primary rights of States to "prevent, reduce, and eliminate pollution" and control local land and water use.

In *SWANCC*, this Court found that to apply the CWA to ponds that did not have a "significant nexus" with a traditional navigable water, like the abutting and inseparably bound up wetlands in *Riverside Bayview*, would run counter to the express intent of Congress and "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Rather than expressing a desire to readjust the federal-state balance in this manner," this Court found Congress chose to defer to the States "'to plan the development and use . . . of land and water resources.'" *Id.* Therefore, this Court was unwilling to expand the reach of the Act beyond its actual text and the facts of *Riverside Bayview*.

IV

A STRICT NEXUS REQUIREMENT IS NECESSARY TO AVOID SIGNIFICANT CONSTITUTIONAL AND FEDERALISM PROBLEMS

In *SWANCC*, this Court affirmed that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress," *SWANCC*, 531 U.S. at 173, and that *Chevron* deference is not appropriate where the "administrative interpretation of a statute invokes the outer limits of Congress' power." *Id.* at 172. Federal regulation of all wetlands hydrologically connected to traditional navigable waters creates the same type of constitutional and federalism problems as the regulation of nonnavigable, isolated, intrastate ponds in *SWANCC*.

A. The Government's Expansive Interpretation of the CWA Raises Significant Commerce Clause Issues

This Court recognizes three categories of legitimate Commerce Clause regulation. First, Congress has authority to regulate the use of the channels of interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* And third, Congress is authorized to regulate activities "that substantially affect interstate commerce." *Id.* at 559.

In *SWANCC*, the government originally argued its "Migratory Bird Rule" fell within the third category of Commerce Clause enactments because "millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds" and discharges of dredged or fill materials into waters used by migratory birds "substantially affect" interstate commerce. *SWANCC*, 531 U.S. at 173. Then, in the course of litigation, the government adopted a different theory suggesting its rule should be sustained as a regulation of activities that substantially affect interstate commerce because the proposed landfill was "plainly of a commercial nature." *Id.* This Court found the government's shifting Commerce Clause rationales raised "significant constitutional questions" because this Court would have to decide which theory applied. *Id.* Now, in this case, the government raises yet a third theory—that the regulation of discharges into a nonnavigable wetland that may affect a traditional navigable water, because of the mere presence of a hydrological connection, is the constitutional equivalent of directly regulating the channel—the actual navigable water—itself. *See* Government Opposition to Petition at 23.

The introduction of another questionable Commerce Clause argument here provides an even more compelling case for avoiding constitutional problems than in *SWANCC*. The

regulation of activities that may affect channels of commerce is not a "channels regulation" but one that must be sustained, if at all, under the "substantially affects" category of Commerce Clause enactments. But, as we demonstrated in our Petition, the regulation of discharges to remote nonnavigable wetlands does not satisfy this Court's "substantial effects" test under *United States v. Lopez*, 514 U.S. 549, and *United States v. Morrison*, 529 U.S. 598 (2000). *See* Petition at 14-26. Therefore, this Court would have to decide which, if any, Commerce Clause theory advanced by the government would sustain its broad interpretation of the CWA. And yet, as in *SWANCC*, "there is nothing approaching a clear statement from Congress" that it intended to regulate all wetlands with any sort of hydrological connection to traditional navigable waters. *SWANCC*, 531 U.S. at 174. The term "wetland" does not appear in any relevant provision of the Act. Nor does the term "hydrological connection." And, in fact, even the agency regulations do not include the "any hyrdological connection" standard adopted by the Sixth Circuit and advanced by the government in this case. *See* 33 CFR § 328.3(a). Those regulations expressly exempt some wetlands that have a hydrological connection to traditional navigable waters. *See id.* § 328.3(a)(7).

B. The Government's Expansive Interpretation of the CWA Raises Significant Due Process Issues

Although this is a civil case, it should not be forgotten that the government's jurisdictional interpretation has criminal implications. As noted above, Mr. Rapanos was subjected to criminal prosecution simultaneously with this civil suit. In his petition for writ of certiorari in his criminal case, which this Court initially granted and remanded in light of *SWANCC*, Mr. Rapanos argued not only that the government had no jurisdiction over his property under the CWA, but that his conviction denied him due process because of the government's amorphous definition of wetlands and jurisdictional waters.

The very definition of "wetlands" defies commonsense. Federal regulations define "wetlands" as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 CFR § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year." Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land.

No reasonable person would conclude that mostly dry land is subject to federal control as a "navigable water." Ocie Mills and his son found this out the hard way. These two were convicted for filling "wetlands" on their property without a permit—an act a district court later characterized as the innocuous placing of clean fill on dry land:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corp of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

For this offense Mills and his son served 21 months in prison, one year in supervised release, paid $5,000 in fines, and were required to restore the site to its original condition. *Id.*

The definition of "discharge" also defies commonsense. In *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), the landowner was charged with filling wetlands without a permit under § 404(a). But the alleged "discharge" was nothing more than moving soil in place by dragging a shank through the hard pan (a process called "deep ripping") to allow for the planting of vineyards in the place of row crops. *Id.* at 812-13. Although no dredged or fill material was actually added to the land, the Corps deemed it so because the soil was disturbed by the plowing process. *Id.* at 814. On writ of certiorari, challenging agency jurisdiction over this activity, this Court affirmed by an equally divided court after Justice Kennedy recused himself from the case. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 537 U.S. 99 (2002).

In addition to "wetlands" and "discharge," other terms defining a CWA violation are equally mystifying. In this case, "adjacent" means hydrologically connected and "tributary" means anywhere water flows, whereas "navigable waters" take in the entire tributary system of the United States. A rule of law as vague and ambiguous as the government's ever-changing § 404(a) jurisdiction, subjecting landowners nationwide to severe criminal penalties raises clear due process questions. This Court has long held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provision of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997) ("[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."). But that is not the case under the Clean Water Act. The government's expansive interpretation of its own authority defies any plain reading of that Act, or even any consistent application.

A recent report from the General Accounting Office (GAO) confirms this. The report documents that the Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), *available at* www.gao.gov/new.items/d04297.pdf (last visited May 2, 2005) (*GAO Report*). But worse than the inter-district disagreements are the *intra*district inconsistencies: the GAO report concludes that even Corps staff working in the same office cannot agree on the scope of the CWA and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. *GAO Report* at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the Corps and EPA. As we see in this case, those decisions become the basis for imposing multimillion dollar penalties and seeking criminal prosecution.

The constitutional implications of this uncertainty are brought more sharply into focus when one considers that the lower courts have interpreted the CWA as a strict liability statute. *United States v. Hanousek*, 176 F.3d 1116 (9th Cir 1999), is a case in point. Edward Hanousek was employed as road master of the White Pass & Yukon Railroad. *Id.* at 1119. As road master, Hanousek was responsible to oversee track maintenance and special projects for the railroad. *Id.* One of the special projects under Hanousek's supervision was the quarrying of rock at a site near the Skagway River in Alaska. *Id.* The project involved blasting rock outcroppings and loading the rock onto railroad cars with a backhoe. *Id.* An oil pipeline ran next to the track at or above ground. *Id.* To protect the pipeline, a platform was constructed over the pipeline on which the backhoe operated while loading rock. *Id.* After one loading

operation, a backhoe operator noticed rock debris just off the tracks near the pipeline about 150 to 300 feet from the work platform. *Id.* While attempting to "sweep" the rocks away from the tracks, the backhoe operator ruptured the pipeline causing oil to leak into the Skagway River in violation of the Clean Water Act. *Id.*

As Hanousek was responsible for all aspects of the operation, he was charged with a criminal count of negligently discharging a "harmful quantity" of oil into a "navigable water" of the United States. *Id.* Hanousek was convicted of the violation and was sentenced to six months in prison, six months in a half-way house, six months of supervised release, and was fined $5,000. *Id.* at 1120.

Hanousek appealed his conviction arguing that to hold him criminally liable for an unintentional act, void of criminal intent, would violate his due process rights. *Id.* at 1121-22. However, the Ninth Circuit Court of Appeals held the Clean Water Act constitutes "public welfare legislation." Under such legislation, the court reasoned, *mens rea* is not required for criminal prosecution. *Id.* This Court denied Hanousek's petition for writ of certiorari with Justices Thomas and O'Connor dissenting. *See Hanousek v. United States*, 528 U.S. 1102 (2000).

The potential for due process issues arising from the government's assertion of authority over any wetland with any sort of hydrological connection to a traditional navigable water provides another reason for this Court to impose a strict nexus requirement on jurisdictional waters.

C. The Government's Expansive Interpretation of the CWA Raises Significant Federalism Issues

In *SWANCC*, this Court observed that the concern raised by pushing the envelope on federal authority is heightened "where the administrative interpretation alters the federal-state

framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. That power, this Court found, is the States' "traditional and primary power over land and water use." *Id.* at 174.

Through the § 404(a) discretionary permit program, the federal government assumes actual veto power over literally tens of thousands of land use projects nationwide every year, potentially usurping the traditional powers of state and local governments. By regulating any wetland, or other area, with any sort of hydrological connection to a navigable water, no matter how remote, intermittent, or attenuated the connection, there is virtually no wet area that is not subject to federal control.

Under the federal government's administrative interpretation of the CWA, the Corps and EPA may regulate any area over which water flows, including a public street with an attached storm drain, a private lawn that drains to the street, or, quite literally, the kitchen sink. If "the presence of a hydrological connection" suffices to establish § 404(a) jurisdiction, then even those areas that are connected by groundwater would be brought within the scope of federal regulation. This would include virtually any area subject to rain runoff and groundwater recharge. The inevitable result of this interpretation would grant these agencies regulatory authority over virtually all waters (and much of the land) in the Nation.

A more significant shift in the federal-state framework would be hard to conceive. Approximately 100,000,000 acres of wetlands are located in the lower 48 states—an area the size of California. *See* http://www.epa.gov/owow/wetlands/vital/status.html (last visited Nov. 8, 2005). About 75% of these wetlands are located on private land subject to state and local control. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 26,

52 (1999). Wetlands cover half the State of Alaska. *See* http://www.epa.gov/owow/wetlands/vital/status.html. Next to Alaska, the states with the largest wetland acreage are Florida (11 million), Louisiana (8.8 million), Minnesota (8.7 million), and Texas (7.6 million). *Id.*

In contrast to the federal government, state wetland programs typically provide a protective but practical approach to wetland protection, such as the treatment of isolated wetlands in the Commonwealth of Massachusetts:

> One of the principal purposes of the definition of Isolated Land Subject to Flooding (ILSF) is to differentiate between those areas that serve the interests of the Act in a significant way and areas where small amounts of water may collect occasionally—puddles, in effect. A second purpose is to distinguish between those areas that are important parts of a larger water resource system—for which the cumulative effects of even small fillings can lead incrementally to serious flooding problems over the entire floodplain—and those that are only locally significant to the interests of storm damage and flood prevention. By making these distinctions, the regulations provide appropriate protection to land areas that function in different ways. A third purpose is to ensure consistent application of these distinctions by the issuing authority, providing a greater degree of certainty for land owners with regard to the standards of review they should expect.

http://www.mass.gov/dep/water/laws/ilsf.htm (last visited Nov. 11, 2005).

Unlike the States, the Corps and EPA draw no distinction between "those areas that serve the interests of the Act in a significant way" and insignificant puddles. The federal government asserts regulatory authority over all areas hydrologically connected to traditional navigable waters without regard to size, features, or function. *See* 33 CFR § 328.3(a). Or, in the consolidated case of *Carabell v. United States Army Corps of Engineers*, 04-1384, the federal government even regulates wetlands with *no* hydrological connection to traditional navigable waters whatsoever.

This intrusion into areas of traditional State concern is no less if the State approves the federal intrusion or if the States can assume control of the federal § 404(a) permit program, like the State of Michigan in this case, where the federal government retains a veto power over state permit decisions. The central government cannot shift the constitutional balance of power by the simple expedient of asserting authority over intrastate waters like those at issue here. More is required: "[W]e expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172.

V

THE RAPANOS PROPERTY DOES NOT SATISFY THE "SIGNIFICANT NEXUS" REQUIREMENT

In *SWANCC* and *Riverside Bayview*, this Court drew a legal line limiting § 404(a) to traditional navigable waters and wetlands with a "significant nexus" to traditional navigable waters. In those cases, that nexus was characterized as abutting and inseparably bound up. Therefore, this Court's jurisdictional line does not encompass the wetlands on the Rapanos' property.

It is undisputed that none of these wetlands abut a traditional navigable waterway. PA at A4-A5. At most, they have only an intermittent hydrological connection with a traditional navigable water. Wetlands at the Salzburg site lie next to a manmade ditch that flows into a nonnavigable stream

that connects with a river that becomes navigable some point downstream and ultimately flows into the Saginaw Bay. PA at A22. That ditch is the "tributary" on which the government's adjaceny determination is based. Rather than physically "bordering, contiguous, or neighboring," the nearest traditional navigable water is 20 miles away. *See Rapanos*, 190 F. Supp. 2d at 1012.

The wetlands at the Hines Road site also lie next to a manmade ditch and the "hydrological connection" is discontinuous, occurring only "seasonally." PA at A23. In other words, the putative connection to the ditch is established by rain runoff flowing over the surface of the land. The ditch itself was deemed to have some connection to the Tittabawassee River, a traditional navigable water, at an unspecified distance downstream. PA at A23.

At the Pine River site the connection between the wetlands and the nearest traditional navigable water is even more tenuous. We are told that the wetlands at that site are "in close proximity to the Pine River" which flows to the navigable Lake Huron. PA at A23-24. But no evidence of a specific connection was produced below except the disputed assertion of the government witness that there is a hydrological connection between the wetland and Pine River. PA at B26. Unfortunately, the record is silent both as to the navigability of Pine River and the distance between the wetlands and the lake.

In addition to the attenuated hydrological connections, the government does not even allege that the discharges at these sites actually reached a traditional navigable waterway. *See* Second Amended Complaint, Joint Appendix at 7-23. Consequently, the government produced no evidence of such a discharge. Nor did the government seek to establish that the traditional navigable waters, in turn, affected the wetlands. Instead, we are left in the Findings of Fact and Conclusions of Law, on which the lower courts relied, with the boiler-plate

assertions of the government's witnesses that the activity on the Rapanos' property resulted in lost wetland functions such as migratory bird habitat, water quality enhancement, and flood control, that allegedly have some "interstate impacts." *See* PA at B11-B12, B20-B21, and B26.

What is lacking in this case is a legally "significant nexus" characterized by wetlands physically adjacent to, and inseparably bound up with, a traditional navigable water. Unlike the jurisdictional wetlands in *Riverside Bayview*, it is not difficult in this case to "choose some point at which water ends and land begins." *Riverside Bayview*, 474 U.S. at 132. That task is easy here; "the transition from water to solid ground is . . . an abrupt one." *Id.*

CONCLUSION

This Court has held that a wetland abutting and inseparably bound up with a traditional navigable waterway has the requisite "significant nexus" required by the Clean Water Act and is subject to § 404(a) jurisdiction. This Court has also held that the text of the Act will not allow extending that jurisdiction to wetlands that are not physically adjacent to traditional navigable waters. This Court need go no further. The notion that any wetland with any hydrological connection is subject to § 404(a) jurisdiction is a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173. This virtually boundless jurisdictional standard provides no meaningful measure of federal Clean Water Act authority and is a disservice to both the regulated public and the enforcing agencies. No one can predict with any certainty whether the Corps or EPA will exert their regulatory authority over virtually any wet area in the Nation.

Therefore, this Court should adopt a bright line rule defining federal authority with a strict nexus requirement and overturn the decision below.

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Respectfully submitted,

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